RECENT CASES

APPEAL AND ERROR—RES JUDICATA—APPLICABILITY OF DOCTRINE OF RESTITUTION WHERE LOSS IS DUE TO AN ERRONEOUS UNAPPEALED JUDGMENT—Upon the basis of a decree in equity awarding them profits and rents under the clause of a will, the petitioners pending the appeal in equity, obtained a judgment in ejectment, involving the same provision, from which no appeal was taken by the respondent. Subsequently, the decree was reversed, and some months later, the respondent brought, in his turn, an action of ejectment for repossession of the real property on the basis of this reversal in the equity court. *Held,* (three justices dissenting),[1] that the unappealed judgment in the first ejectment action was *res judicata. Reed v. Allen,* 52 Sup. Ct. 532 (1932).

As a general rule, a court may judicially notice its own reversal of another judgment and so reverse a judgment based upon it.[2] The instant case, however, presents the problem where the judgment based on the foundation judgment had not been appealed. Should the unappealed judgment be treated as *res judicata*[3] or should the court, having reversed the foundation judgment, disregard the unappealed judgment and invoke the common law remedy of restitution?[4] The majority of the court, basing its decision on the doctrine of *res judicata,* or, as it is also called, estoppel by judgment, followed a well recognized line of cases to the effect that a judgment which had not been appealed is conclusive between the parties, even though such judgment is erroneous.[5] Although intimating that there was some degree of relationship between the decree and the subsequent action at law,[6] the court was too impressed by the fact that the rights were asserted in different causes of action.[7] As a consequence, the petitioners gained title to the realty while the respondent received the profits and rents accruing from that realty. Such a result is most inconsistent when one considers that the final decree in equity determined the true construction of the will on which the rights of the parties were based. To avoid this result, the dissenting opinion, recognizing that the final decree was the real basis of the disposition of the property would have invoked the doctrine of restitution to restore to the respondent what he had lost by means of the erroneous decree.[8] Compelling as is

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[1] Justice Brandeis and Justice Stone concurred in the dissenting opinion written by Justice Cardozo.

[2] Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. 985 (1891); Straus v. The American Publishers Ass'n, 201 Fed. 306 (C. C. A. 2d, 1912); Poole v. Seeney, 70 Iowa 275, 24 N. W. 520 (1885).

[3] "This doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal or concurrent jurisdiction, on the point and matters in issue and adjudicated in the first suit." 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 627.

[4] Restitution at common law is a remedy or writ whose object was to restore to the appellant the specified thing or its equivalent, of which he has been deprived by the enforcement of the judgment against him during the pendency of the appeal. Haebler v. Myers, 132 N. Y. 362, 30 N. E. 963 (1892).

[5] Republic of China v. Merchants Fire Assurance Corp. of America, 49 F. (2d) 862 (C. C. A. 9th, 1931); Shrock *et al.* v. Campbell, 34 S. W. (2d) 324 (Tex., 1931).

[6] ". . . and it rationally may not be doubted that, upon application and a showing of their relationship, the court would have heard them together, or at least not have disposed of the appeal from the judgment without considering its connection with the other appeal from the decree." See the principal case at 533.

[7] See principal case at 533.

[8] "Even if the appeal from the decree had been heard and decided first, the reversal of the second julgment would have followed, not for any error of the trial court, but in furtherance of substantial justice by the application of principles analogous to those that govern the allowance or denial of a writ of restitution." See the principal case at 536.

the doctrine of *res judicata,* where, as here, injustice is worked by strict adherence to formal procedure, a greater degree of liberality might well have been evinced without doing great violence to precedent.[9]

BANKRUPTCY—ACT OF BANKRUPTCY—RIGHT OF SURETY TO PETITION WHEN AT TIME OF FRAUDULENT TRANSFER HIS CLAIM WAS YET CONTINGENT—Subsequent to a verdict against the principal of a fireworks exhibitor's bond in an action for injuries, but prior to entry of judgment, the surety's indemnitor transferred her property with intent to defraud the surety. Within four months, having paid the judgment, the surety, as sole creditor, filed a petition in involuntary bankruptcy against said indemnitor. *Held* (one judge dissenting), that no act of bankruptcy had been committed, since no creditor existed at the time of the transfer. *Marotta v. American Surety Company of New York,* 57 F. (2d) 829 (C. C. A. 1st, 1932).

Similar cases have considered not whether an act of bankruptcy [1] had been committed, but whether, as a procedural matter, the subsequent creditor could petition under Section 59 [2] of the *Bankruptcy Act.* The earlier cases refused the petition of one whose claim arose after the alleged act of bankruptcy on the ground that his rights had not been impaired.[3] The modern cases, however, have permitted such a petition, since the petitioner obtains no greater advantage than any other creditor whose claim is allowed, and since such petitions are not specifically prohibited by the Act.[4] Even though the latter and apparently more desirable rule is applied, if the petitioner is the only creditor alleged, the petition should be dismissed for want of an act of bankruptcy, since the required intent toward a creditor is lacking. Moreover by applying this principle, the earlier cases can be reconciled with the later, since in the former no creditor appears who existed at the commission of the alleged act of bankruptcy,[5] while in the latter, although the petitioner in question may have had no claim then, there were other creditors existent at the time of the alleged act.[6] In the instant case

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[9] In Watts, Watts & Co. v. Unione Austriaca, *etc.,* 248 U. S. 9, 39 Sup. Ct. 1 (1918), the Supreme Court took cognizance of conditions outside of its own records and in granting the relief against the judgment held to be right when it was entered, the court there said, at 21, 39 Sup. Ct. at 2: "This court in the exercise of appellate jurisdiction, has power not only to correct error in a judgment entered below, but to make such disposition of the case as justice may at this time require. And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below."

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[1] § 3, 30 STAT. 546 (1898), 11 U. S. C. A. § 21 (1927), defining act of bankruptcy, provides, *inter alia,* that it shall consist of a person "having (1) conveyed, transferred, concealed or removed . . . any part of his property with intent to hinder, delay or defraud his creditors, or any of them; . . ."

[2] 30 STAT. 561 (1898), 11 U. S. C. A. § 95 (1927), stipulating that "three or more creditors who have provable claims . . . or if all of the creditors of such person are less than twelve in number, then one of such creditors . . . may file a petition to have him adjudged a bankrupt."

[3] *In re* Brinckman, 103 Fed. 65 (D. C. Ind. 1900); *In re* Callison, 130 Fed. 987 (D. C. Fla. 1903); *Ex parte* Charles, 14 East 197, 16 Ves. 256 (Eng. 1811). See also COLLIER, BANKRUPTCY (11th ed. 1917) 843.

[4] *In re* Hanyan, 180 Fed. 498 (S. D. N. Y. 1910); *In re* Van Horn, 246 Fed. 822 (C. C. A. 3d, 1917); *In re* Western Gear, 53 F. (2d) 644 (E. D. Mich. 1931); Note (1932) 41 YALE L. J. 784; BLACK, BANKRUPTCY (4th ed. 1926) § 265.

[5] See *In re* Stone, 206 Fed. 356 (E. D. Pa. 1913); *In re* Farthing, 202 Fed. 557, 563 (E. D. N. C. 1913); as well as cases cited *supra* note 3.

[6] Cases cited *supra* note 4. In citing cases where no other creditors are mentioned, the court construes these decisions as not inconsistent with its own. See principal case at 832 (in discussing *In re* Van Horn, *supra* note 4).

the surety's claim was not provable in bankruptcy,[7] for notwithstanding the contractual relationship of the parties, the claim arose out of a tort, which type of demands is contingent until judgment is entered, verdict alone being insufficient.[8] At the time of the transfer, neither the injured party nor the surety owned a provable claim, the possession of which is the criterion of a creditor under the definition of the act.[9] Therefore, since there was no creditor, the intent was to defraud one in some other relationship than that required for an act of bankruptcy, and the petition was properly dismissed.[10]

BANKS AND BANKING—INSOLVENCY—POWER OF EQUITY TO PERMIT STATUTORY RECEIVER TO BORROW FROM R. F. C.—The State Supervisor of Banking declared a state bank insolvent and, pursuant to statute [1] took possession of all affairs and assets for the purpose of liquidation. The Superior Court granted his petition requesting authority to borrow from the Reconstruction Finance Corporation [2] and to pledge the assets of the bank as collateral. An appeal was taken to the Supreme Court. *Held,* (four justices dissenting) that the statute impliedly conferred upon the Supervisor the power to borrow,[3] subject to the court's authorization. *Sim et al., State ex rel. v. Superior Court for Chelan County et al.,* 13 P. (2d) 892 (Wash. 1932).

At common law courts of equity appointed and controlled receivers of insolvent estates.[4] Many states, however, under the exercise of their police

[7] § 63a, 30 STAT. 562 (1898), 11 U. S. C. A. § 103 which, as far as appropriate, defines a provable claim as a "fixed liability," "absolutely owing," "founded upon an open account or a contract, express or implied." This differs from the earlier acts which expressly permitted proof of contingent demands, 5 STAT. 440 (1841) and 14 STAT. 517 (1867).

[8] Black v. McClelland, Fed. Cas. 1462 (C. C. W. D. Pa. 1875); *In re* Ostrum, 185 Fed. 988 (D. C. Minn. 1911); *In re* Brinckman, *Ex parte* Charles, both *supra* note 4. But *cf.* Kilpatrick v. U. S. Fidelity and Guaranty Co., 228 Fed. 587 (C. C. A. 5th, 1916) (holding that a surety to release garnishments was a creditor before judgment against the principal). Surety may at all times prove his claim in name of the third party creditor, 30 STAT. 560 (1898) 11 U. S. C. A. § 93i (1927); Insley v. Garside, 121 Fed. 699 (C. C. A. 9th, 1903); Livingstone v. Heineman, 120 Fed. 786 (C. C. A. 6th, 1903). For a complete discussion of the problem see Holbrook, *A Surety's Claim Against His Bankrupt Principal* (1912) 60 U. OF PA. L. REV. 482.

[9] § 1 (9), 30 STAT. 544 (1898), 11 U. S. C. A. § 1 (9), provides that a creditor within the meaning of the act is "anyone who owns a demand or claim provable in bankruptcy." The dissenting judge declared that a broader common law definition should be applied. *Cf.* Thomson v. Crane, 73 Fed. 327, 331 (C. C. D. Nev. 1896). Such definition, however, appears directly contrary to the expressed intent of the act. See *supra* note 7.

[10] Such a palpable fraud on the surety is not without redress in the state courts under statutes permitting creditors to avoid fraudulent transfers. "It is everywhere admitted that if the grantor intended to defraud subsequent creditors, they may attack the conveyance", 2 WILLISTON, SALES (2d ed. 1924) 642; GLENN, FRAUDULENT CONVEYANCES (1931) 333. Therefore a transfer made with intent to defraud the creditor of a subsequent tort may be avoided, White v. Amenta, 110 Conn. 314 (1930). The jurisdiction of the instant case follows the general rule, Day v. Cooley, 118 Mass. 524 (1875); see Wood v. National City Bank, 24 F. (2d) 661, 663 (C. C. A. 2d, 1928).

[1] WASH. COMP. STAT. (Remington, 1922) § 3266.

[2] The purpose of the loan was in harmony with the policy of the Reconstruction Finance Corporation Act, 15 U. S. C. A. § 605 (Cum. Pamph. 1932), namely, to delay the liquidation of assets which, in the abnormally deflated condition of the market, could be converted into cash only at a great sacrifice; and to enable the supervisor to pay the claims of preferred creditors and declare a first dividend to depositors and general creditors of the insolvent bank. *Cf.* Circular No. 1 of the R. F. C., Feb. 1932.

[3] WASH. COMP. STAT. (Remington, 1922) § 3269 requires the supervisor to collect, preserve, administer, and liquidate the assets of the bank; and sell or compound bad debts with the approval of the court.

[4] Ensley Development Co. v. Powell, 147 Ala. 300, 40 So. 137 (1906); McDougall *et al.* v. Huntingdon and Broad Top R. & C. Co., 294 Pa. 108, 143 Atl. 574 (1928); Washington Iron Works Co. v. Jensen, 3 Wash. 584, 28 Pac. 1019 (1892); HIGH, RECEIVERS (4th ed. 1910) §§ 40, 41.

power,[5] have concentrated the supervision of state banks under an administrative officer.[6] This legislation was primarily designed to eliminate the expense involved in setting up new and independent receivership units for each insolvent bank, and to insure more skillful management of smaller banks.[7] The operation of the Reconstruction Finance Corporation has made it necessary to determine to what extent equity controls receivers under these statutes. Although the banking statutes of most states are impressively similar—those of Utah and Washington in particular [8]—recent decisions indicate three general types of interpretation. The first [9] finds a legislative intent to create a statutory official over whom courts of equity have no jurisdiction not given in the statute.[10] The second [11] reserves to equity its "inherent power to permit the banking commissioner to exercise the functions of a chancery receiver in matters not inconsistent with his statutory duties." [12] The third, and the viewpoint of the principal case, construes the statute as conferring general powers upon the supervisor, but retaining for the court the function of authorizing each specific exercise of those powers. Hence the court felt it necessary to imply a statutory power to borrow.[13] It is to be hoped that the reasoning of the Washington and North Carolina decisions [14] will show courts faced with similar difficulties how to take advantage of this emergency measure. A narrow interpretation, if followed in many jurisdictions, may do much to hinder a federal economic program that places considerable emphasis upon the liberation of the potential purchasing power locked in the frozen assets of insolvent banks.

CONFLICT OF LAWS—DOMICIL—CONFLICTING FINDINGS OF DOMICIL BY DIFFERENT STATES—Decedent was admittedly domiciled in New Jersey prior to 1925 when he purchased a residence in Pennsylvania, having been advised by counsel that he would not thereby acquire a domicil in Pennsylvania unless "he intended to abandon his New Jersey residence." Thereafter he voted, paid taxes,

[5] Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186 (1911); Bryan v. Bullock, 84 Fla. 179, 93 So. 182 (1922); Allen, Commissioner of Banks v. Prudential Trust Co., 242 Mass. 78, 136 N. E. 410 (1922).

[6] Illustrative Statutes: ALA. CODE (Michie, 1928) §§ 6276, 6306, 6307, 6309; ARIZ. CODE (Struckmeyer, 1928) §§ 210, 246, 247; GA. CODE ANN. (Michie, 1926) § 2366 (8), (51); KY. STAT. (Carroll, 1930) § 165a-2-14-16-17; N. Y. CONS. LAWS (Cahill, 1930) c. 3, § 10; UTAH COMP. LAWS (1917) §§ 971, 975.

[7] Billig, *Extra-Judicial Administration of Insolvent Estates* (1930) 78 U. OF PA. L. REV. 293 at 298. For procedural difficulties of judicial administration, applicable as well to state banks see Note (1931) 44 HARV. L. REV. 618.

[8] Compare Utah Laws 1921, c. 23, §§ 1, 2, 13 (repealing UTAH COMP. LAWS (1917) § 1007); Utah Laws 1923, c. 33, § 7, with WASH. COMP. STAT. (Remington, 1922) §§ 3267, 3268, 3269 (*supra* note 3), 3276.

[9] Riches v. Hadlock, Sup. Ct. Utah, U. S. Daily, May 7, 1932, at 450.

[10] For a suggestion that the court in Riches v. Hadlock, *supra* note 9, may have refused to construe the statute liberally because of its reluctance to place such power in the hands of a political officer see Note (1932) 41 YALE L. J. 1252.

[11] Blades v. Hood, Commissioner of Banks, 164 S. E. 828 (N. C. 1932).

[12] Adams, J., in Blades v. Hood, *supra* note 11, at 831.

[13] For a result in accord with that of the principal case in a state where the bank commissioner applies to the court for appointment of a receiver see Bassett v. City Bank and Trust Co., 161 Atl. 852 (Conn. 1932).

[14] Since the appeal was in the nature of a writ of prohibition the only question at issue in Riches v. Hadlock was the power of equity to authorize the loan. The tenor of the opinion, however, suggests that the court was motivated by discretionary reasons. Straup, J., in Riches v. Hadlock, *supra* note 9, at 458, col. 1. If a court deems it unwise to allow a loan in a particular instance it can base its refusal on its inherent equitable discretion. The desired result could thus be reached without setting a precedent.

attended vestry meetings in New Jersey, and occasionally slept there. Maintenance costs of the New Jersey residence decreased from $29,000 in 1924 to $6500 in 1929, in which year running expenses of the Pennsylvania residence exceeded $90,000. He entertained exclusively at his Pennsylvania home, and here his family lived, attended church and school. He frequently and vigorously declared that he retained his New Jersey citizenship. *Held* (two justices dissenting), that at his death he was domiciled in Pennsylvania, and therefore his estate was subject to the Pennsylvania inheritance-tax assessment. *Dorrance's Estate,* Pa. Sup. Ct., decided Sept. 26, 1932.

Since a death-transfer tax had previously been levied by New Jersey,[1] it is obvious that if double taxation is to be avoided,[2] the rule that domicil is determined by the law of the forum [3] cannot be an inflexible one. Methods by which the Supreme Court of the United States can be called upon to act as final arbiter in the determination of domicil will be exhaustively analyzed in a forthcoming note.

CONSTITUTIONAL LAW—POLICE POWER—ZONING—EXCLUSION OF CHARITABLE INSTITUTIONS FROM RESIDENTIAL DISTRICTS—A comprehensive zoning ordinance allotted charitable institutions no definite location but permitted their establishment in any zone by consent of council. The council refused to permit the use of a house in the first residential district as an old ladies' home. *Held,* that the provision was invalid as discriminatory and without relation to the comprehensive zoning plan. *Women's Kansas City St. Andrew Soc. v. Kansas City,* 58 F. (2d) 593 (C. C. A. 9th, 1932).

The Supreme Court in its recent validation of comprehensive zoning has made clear that the justifiable scope of the police power is not to be restricted to the traditionally crystallized field of protection of public health, safety, and morals.[1] Instead, the courts now stand ready to accept as valid *any* restriction which can be said to be reasonably related to a protection of the "general welfare"—by inevitable implication, any restriction serving a social purpose of which the court approves.[2] The principal case, as one of a series [3] dealing with

[1] Record of lower court proceedings, v. III, p. 961a.

[2] See First National Bank of Boston v. State of Maine, 52 Sup. Ct. 174 (1932).

[3] CONFLICT OF LAWS RESTATEMENT, Proposed Final Draft No. 1 (AM. L. INST. 1930) § 11: "A question of domicil arising in litigation is determined by the law of the forum."

[1] Euclid v. Ambler, 272 U. S. 365, 47 Sup. Ct. 114, 54 A. L. R. 1016 (1926) (Blanket exclusion of business establishments from residential district held valid). Now almost universally state law. Aurora v. Burns, 319 Ill. 84, 149 N. E. 784 (1925); Biggs v. Steinway, 229 N. Y. 320, 128 N. E. 211 (1920). For an illustration of the startling effect of this decision upon jurisdictions formerly limiting the police power to the protection of public health, safety and morals only, compare White's Appeal, 287 Pa. 259, 134 Atl. 409 (1926) with Ward's Appeal, 289 Pa. 458, 137 Atl. 630 (1927). *Contra* to the Euclid case: Smith v. Atlanta, 161 Ga. 769, 132 S. E. 66 (1927).

[2] "While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet new and differing conditions." Sutherland, J., in Euclid v. Ambler, *supra* note 1, at 387, 47 Sup. Ct. at 118. Traditional crystallizations of the scope of the police power are no longer binding; the due process clause becomes purely a check to express sociological displeasure. Whether or not the Court recognized the scope of sociological criticism it so calmly shouldered, commentators have been quick to make it clear. Freund, *Some Inadequately Discussed Aspects of the Law of City Planning and Zoning* (1929) 24 ILL. L. REV. 135; Ribble, *The Due Process Clause in Zoning Legislation* (1930) 16 VA. L. REV. 689; Note (1932) 80 U. OF PA. L. REV. 429.

[3] Gorieb v. Fox, 274 U. S. 603, 47 Sup. Ct. 448 (1927); Nectow v. Cambridge, 277 U. S. 183, 48 Sup. Ct. 447 (1928); Washington v. Roberge, 278 U. S. 116, 49 Sup. Ct. 50 (1928); Village of University Heights v. Jewish Orphans' Home, 20 F. (2d) 743 (C. C. A. 6th, 1927).

consequent legislation advancing new restrictions clearly outside previously recognized crystallizations, illustrates plainly the conflict between so abstractly ideal an attitude and the characteristic judicial shyness [4] of assuming the burden of social criticism. The facts would seem to present a clear issue [5] as to whether a restriction aiming at the preservation of residential property values by the exclusion from such districts of institutions obnoxious merely to class preferences is so socially desirable as to deserve recognition as being within the scope of the police power.[6] Yet the court preferred to rest its decision upon the scarcely satisfactory grounds that the discretion placed in the hands of council is an unjustified delegation of legislative power possible of discriminatory abuse;[7] and that the restriction could not be said to be "essential" to the zoning plan since no district was by the ordinance definitely closed to the type of institution in question.[8] Whatever remarks are made by way of approach to the problem of social evaluation [9] are relegated to the position of *dicta*.[10] It appears that while the broad view of the police power is readily accepted,[11] the social evaluation implied will be avoided by the courts [12] whenever possible, even at some sacrifice of consistency, and that meanwhile any ordinance of questionable purpose will suffer far more severely

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[4] See Hough, *Due Process of Law To-Day* (1919) 32 HARV. L. REV. 218, 230.

[5] The court carefully eliminated any other possible justification of the restriction. No aesthetic matters were concerned, since the house, formerly a private residence, was to be left unchanged. There was no problem of congestion, noise, *etc.*, since no more than twelve guests were to be accommodated.

[6] Such a motive in zoning, though it has suffered from a conspiracy of silence, is scarcely so novel or so insupportable as to deserve disregard. It is surely not absent in blanket exclusions of business establishments from residential districts, Euclid v. Ambler, *supra* note 1, and seems of very nearly major importance where the establishment excluded is an undertaking home, Spencer-Sturla Co. v. Memphis, 155 Tenn. 70, 290 S. W. 608 (1926). It has found scattered but increasing mention: METZENBAUM, THE LAW OF ZONING (1930) 124; Koch v. Toledo, 37 F. (2d) 336 (C. C. A. 6th, 1930). See also the language of Kephart, J., in Ward's Appeal, *supra* note 1, at 471, 137 Atl. at 634.

[7] Such discretionary power as is here involved is not deemed objectionable where the purpose of the restriction is already settled as acceptable, it being generally presumed that the discretion will be exercised in accordance with the spirit of the zoning plan. Gorieb v. Fox, *supra* note 3. Also, Cusack Co. v. Chicago, 242 U. S. 256, 37 Sup. Ct. 190 (1916) (the fact that adjoining owners might consent to the lifting of a ban against billboards was not objectionable where the exclusion was approved of as conducive to public safety and morality).

[8] It is difficult to distinguish such a situation from that of a blanket exclusion with the possibility of variance in any given instance, which latter discretion, when the court is satisfied as to the worthiness of the purpose of the exclusion, is not held to dissociate the restriction from the general zoning plan, or to deprive it of any of the added justification it acquires by virtue of such relation. Cusack Co. v. Chicago, *supra* note 7; Spencer-Sturla Co. v. Memphis, *supra* note 6. There would scarcely seem to be a situation in which complete discretion would be more justified than in the case of charitable institutions, presenting so highly individual a problem in each instance.

[9] It is somewhat fugitively stated (principal case at 604) that the restriction finds its purpose in the exclusion from certain districts of certain social classes, treated as a deprivation of *liberty* without due process, citing Buchanan v. Warley, 245 U. S. 60, 38 Sup. Ct. 334 (1919). The due process clause as regards the ideal of personal liberty is still firmly imbedded in traditional crystallizations; by appealing to them the court still avoids making a social evaluation. One wonders, however, if such a class exclusion was not partially at least the purpose of the acceptable business restrictions above. That the problem is of one cloth seemed clear at least to Justice Holmes, the great expounder of the "reasonability" attitude as applied to due process. See his dissent in Liggett v. Baldridge, 278 U. S. 105, 49 Sup. Ct. 57 (1928).

[10] There is the eventual admission that "the case for defendant would be stronger had it definitely allotted certain territory to institutions of like character with plaintiff." Principal case at 605.

[11] The principal court had cheerfully acceded to Holmes' definition of police power—Noble State Bank v. Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188 (1911)—as extending "to all the great public needs."

[12] The principal case is not alone in this respect. See Washington v. Roberge, and University Heights v. Jewish Orphans' Home, both *supra* note 3.

from objection as to technique—discrimination, undue discretion, impracticability —than one bent upon a traditionally acceptable end.[13]

CONTRACTS—VALIDITY OF DEFENSE THAT PERFORMANCE WAS FRAUD ON THIRD PARTY—The performance of the contract in suit required the plaintiff to violate the terms of his passage on the Graf Zeppelin in its flight to America by sending apparently private messages which were published by the innocent [1] defendant as news to the injury of a third party who had already purchased from the Zeppelin owners the exclusive news rights. *Held,* that the defense that the contract was a fraud on the Zeppelin owners and the third party is legally sufficient to deny to the plaintiff the aid of the courts. *Reiner v. North American Newspaper Alliance,* 259 N. Y. 250, 181 N. E. 561 (1932).

Although the authority that declares a contract illegal when its performance involves the breach of a prior contract is not conclusive,[2] where the plaintiff has agreed to violate a common law duty or an established public policy he may not resort to the courts to enforce the agreement.[3] Thus contracts to publish a libel,[4] to betray trust and confidence,[5] to induce intentionally breach of prior contract,[6] to restrain trade unreasonably,[7] or in furtherance of immoral activities [8] have been held unenforceable by the wrongdoers although innocent parties thereto may sue for losses from non-performance.[9] The court's difficulty in the instant case lay in defining the "wrong" that denied the plaintiff a legal remedy.[10] He cer-

[13] Compare the hypercriticism of the principal case with the language in Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 30 Sup. Ct. 301, 302 (1910) (exclusion of cemetery for reasons of health), "If every member of this Bench thought burying grounds were centers of safety it would not dispose of the case."

[1] As the case was pleaded, the defendant was considered as being unaware of the terms of passage or of the existence of the exclusive news rights. Even if the parties were *in pari delicto,* however, the plaintiff's illegal conduct would deny him recovery. 3 WILLISTON, CONTRACTS (1922) § 1761.

[2] In the words of the CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 576: "A bargain the making or performance of which involves breach of a contract with a third person, is illegal." It is submitted that this is a broader proposition than the decided cases will support. Invariably the situation is one in which both the illegal contractors are fully aware of the pre-existing rights which they have intentionally violated, and one is liable in tort for inducing the other to breach his contract. Wanderers Hockey Club v. Johnson, 25 Western L. R. 434 (Brit. Col. 1913); Friedberg v. McClary, 173 Ky. 579, 191 S. W. 300 (1917).

The courts have long favored freedom of competition, and have gone so far as to refuse to restrain business solicitation even in the face of existing adverse contracts provided that the solicitor does not promise to indemnify for the breach of the prior contract. Citizens Light, Heat and Power Co. v. Montgomery Light and Water Power Co., 171 Fed. 553, 560 (M. D. Ala. 1909); *cf.* Quinn v. Leatham, [1901] A. C. 495. Certainly it is not established that if *A* because of a better bargain elects to sell his goods to *B* having already agreed (though not to *B's* knowledge) to sell them to *C, A* could not sue *B* for the contract price. *Cf.* POLLOCK, CONTRACTS (3d Am. ed. 1906) 376.

[3] CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 571; 3 WILLISTON, CONTRACTS (1922) § 1738.

[4] Shackell v. Rosier, 2 Bing. 634 (N. C. 1836); *cf.* Lea v. Collins, 4 Sneed 393 (Tenn. 1857).

[5] Guernsey v. Cook, 120 Mass. 501 (1876); Horbach v. Coyle, 2 F. (2d) 702 (C. C. A. 8th, 1924).

[6] Roberts v. Criss, 266 Fed. 296 (C. C. A. 2d, 1920), 11 A. L. R. 698 (1921); Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940 (1907).

[7] Alger v. Thacher, 19 Pick. 51 (Mass. 1837).

[8] Holmead v. Maddox, 2 Cranch 161, 12 Fed. Cas. No. 6629 (C. C. D. C. 1818).

[9] Millward v. Littlewood, 5 Ex. 774 (1850); 3 WILLISTON, CONTRACTS (1922) § 1631; CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 599.

[10] In view of the discussion, *supra* note 2, it is interesting to point out that although there were four concurring opinions none of the justices believed that breach of the terms of passage alone would bar the plaintiff from his action; each demanded a violation of some common law duty.

tainly did not induce the Zeppelin owners to breach the exclusive news rights contract.[11] Also, to ignore all but the contract in suit and the contract of passage and to consider his act of going on board the airship a separate "representation", duly relied upon, that he would not violate his contract is not sound.[12] To justify the holding, however, it is not necessary either to classify the plaintiff's acts according to the more common forms of tort action, or to leave the matter vaguely in the hands of the court's conscience.[13] It would seem sufficient to point out that the general duty to refrain from inflicting an inexcusable [14] and intentional injury upon others [15] extends in the modern view to the protection of contractual as well as property rights.[16] With no greater justification than his own financial advantage, the plaintiff intentionally injured the purchaser of the exclusive news rights by preventing his enjoyment of the contractual benefits to which he was legally entitled. Having contracted to commit a tort [17] the plaintiff must fail.

CORPORATIONS—THE EFFECT OF DISREGARDING THE CORPORATE ENTITY IN ORDER TO SET ASIDE A FRAUDULENT CONVEYANCE UPON THE SUBSEQUENT INDIVIDUAL LIABILITY OF SHAREHOLDER—In a previous decision [1] this court had disregarded the corporate entity of the defendant corporation and, calling it merely the "nominal identity" of defendant Mosher, forced a reconveyance of the business of a partnership, which business Mosher, in her capacity as surviving partner, had previously purported to convey to the corporation.[2] Present plaintiffs sue

[11] Crane, J., and probably Pound, C. J., misunderstood the none too clear opinion of Hubbs, J., in the instant case as meaning that the plaintiff induced a breach of the exclusive news contract. Hubbs. J., undoubtedly offered that tort action only as an example of the protection of contracts from third party interference because, strictly speaking, inducing or procuring breach of contract implies persuading one of the parties to it to violate its terms which is not the instant case. Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663.

[12] This analysis, suggested by Pound, C. J., does not fit the facts. The Zeppelin owners against whom the tort was supposed to be committed surely did not change their position or rely in any new way upon the plaintiff's act of coming on board. Their reliance was upon the terms of the contract, and when the plaintiff made these representations he had no intention, as the case was pleaded, to act to the contrary.

[13] In Rich v. New York Cent. & H. R. Co., 87 N. Y. 382 (1882), a tort action was maintained against one who deliberately broke his contract with the plaintiff knowing it would result in a third party foreclosing a mortgage on the plaintiff's hotel. *Cf.* Thomas v. Caulkett, 57 Mich. 392, 24 N. W. 154 (1885); Barry v. Mulhall, 162 App. Div. 749, 147 N. Y. Supp. 996 (1914).

In the instant case Crane, J., expressed the opinion (at p. 564) that "Fraud, deceit, breach of trust, are general terms covering divers situations and circumstances, and seldom yield to definition or limitation; . . .", and suggested the broad and flexible doctrine that where a contract is against "good morals" as determined at the court's discretion it will not be enforced.

[14] The duty in reference to contracts is not an absolute one; public policy often excuses its breach. *Supra* note 2; *cf.* Wooden v. Shotwell, 24 N. J. L. 789 (1854).

[15] See Holmes, J., in Aikens v. Wisconsin, 195 U. S. 194, 204 (1904); Skinner & Co. v. Shew & Co. (1893) 1 Ch. 413, 422; POLLOCK, TORTS (13th ed. 1929) 22, 23.

[16] "*First.* We have the right in a contract. Our law now recognizes a contract right as property which is to be protected against undue interference by persons not parties to the contract. When a third party intentionally, by the use of any kind of means, causes a breach of the contract involving damage, he is *prima facie* guilty of a tort." Booth & Brother v. Burgess, 72 N. J. Eq. 181, 188, 65 Atl. 226, 229 (1906); *cf.* Raymond v. Yarrington, 96 Tex. 443, 451, 73 S. W. 800, 803 (1903). But *cf.* POLLOCK, TORTS (13th ed. 1929) 572, 573.

[17] Andrews v. Blakeslee, 12 Iowa 577 (1862) (tort sustained against defendant who breached contract with third party impairing, intentionally, security of plaintiff's loan to said third party); National Phonograph Co. v. Edison Bell Consol. Phono. Co. [1908] 1 Ch. 335.

[1] Mosher v. Lee, Receiver, 32 Ariz. 560, 261 Pac. 35 (1927).

[2] The facts in Mosher v. Lee, *supra* note 1, were these: Mosher was conducting the business of the City Ice Delivery Co., a partnership, as surviving partner. The deceased part-

Mosher and the corporation for work and labor done and for power sold and delivered during the time that the corporation was in fact in control of the partnership's business. *Held,* that the corporation be discharged, and that defendant, Mosher, be held individually liable therefor. *Mosher v. Bellas,* 33 Ariz. 147, 264 Pac. 468 (1928); *Mosher v. Salt River Valley Water Users' Assn.,* 8 P. (2d) 1077 (Ariz. 1932).

From an early date the law has looked upon a corporation as an entity distinct and separate from the shareholders.[3] It has been held that even if all the shares are owned by one person, in absence of "fraud" [4] on the complainant, he will not be held liable for the obligations of the corporation.[5] Where, however, this fiction is invoked for purposes not sanctioned by the law, courts will, as was done in *Mosher v. Lee,*[6] disregard it [7] and proceed to charge the individual parties attempting to hide behind this veil.[8] It is granted that in *Mosher v. Lee* [9] the court was fully justified in ignoring the fiction where it was used in an attempt to perpetrate a fraud.[10] However, in the principal cases there was no fraud alleged, nor was there any other abuse of the privileges bestowed by law, in respect to the instant factual situations. Both parties dealt with the corporation on *its* credit and not with Mosher. Unless the use of the entity in an illegal manner in one instance will forever and unconditionally rob it of its effect, at least as respects the immunity of shareholders from liability for the corporation's debts,[11] there is no apparent justification for the present decisions.[12] If the court had intended

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ner's executrix petitioned for the appointment of a receiver to preserve the assets. While this litigation was pending Mosher organized a "dummy" corporation entitled City Ice Delivery Co., Inc., which she controlled and transferred to it the business of the Ice Co. Lee, who was appointed receiver, sought a decree cancelling the conveyance and restraining Mosher and the Ice Co., Inc., from using the trade name of the partnership. The court held that a purchase of the business of the partnership by a surviving partner, in absence of certain formalities here not observed, was *ipso facto* fraud, and, disregarding the corporate entity, called the corporation the "nominal identity" of Mosher and granted the relief prayed for.

[3] Rhawn v. Edge Hill Furnace Co., 201 Pa. 637, 51 Atl. 360 (1902); People's Pleasure Park Co. v. Rohleder, 109 Va. 439, 61 S. E. 794 (1908).

[4] This "fraud" includes not only actual fraud but any use of the device to shield acts not in accord with law or public policy. See WORMSER, THE DISREGARD OF THE CORPORATE FICTION (1927) 42 *et seq.* for a complete discussion of this point.

[5] City of Winfield v. Wichita Natural Gas Co., 267 Fed. 47, 59 (C. C. A. 8th, 1920); Flickema v. Henry Kraker Co., 252 Mich. 406, 233 N. W. 362 (1930). He must, however, make his agreed contribution to the capital. BALLANTINE, MANUAL OF CORPORATION LAW AND PRACTICE (1930) §§ 199 and 200, and cases cited in notes thereto, especially Johns v. Clother, 78 Wash. 602, 139 Pac. 755 (1914) (agreement by subscriber to pay more than par value for stock).

[6] *Supra* note 1.

[7] This seems to be merely another application by the courts of the principal that a fiction will never be used if it works an injustice. *Cf.* United States v. 1960 Bags of Coffee, 8 Cranch 398, 415 (U. S. 1814); Hibbard v. Smith, 67 Cal. 547, 561, 4 Pac. 473, 482 (1885); Johnson v. Smith, 2 Burr. 950, 962 (Eng. 1760).

[8] Wenban Estate, Inc. v. Hewlitt, 193 Cal. 675, 227 Pac. 723 (1924); First National Bank of Chicago v. Trebein Co., 59 Ohio 316, 52 N. E. 834 (1898); 1 MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 227; WORMSER, *loc. cit. supra* note 4.

[9] *Supra* note 1.

[10] For the nature of the fraud see Mosher v. Lee, *supra* note 1, at 568, 261 Pac. at 39.

[11] Evidently some of the other corporate attributes remained since the decree granted in Mosher v. Lee, *supra* note 1, *inter alia,* restrains the corporation from using the trade name of the partnership.

[12] Ross, C. J., in principal case, Mosher v. Bellas, at 153, 264 Pac. at 470 (cited verbatim in principal case, Mosher v. Water Users' Ass'n at 1078): ". . . We cannot shut our eyes to what we said about the whole transaction (the purported sale of the partnership business). . . . Since the corporation was only the "nominal identity" of defendant, Mosher, it must be the help was working for her." This is the sole reason given by the court for its holding in the instant cases.

to let the fraud of one instance create a continuous disability as suggested above, a clear holding to that effect would have been preferable.[13]

DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES WHERE LOSS CONSISTS OF BANK'S SUBSTITUTING INCONVERTIBLE CURRENCY—The defendant, having printed inconvertible notes for the plaintiff bank of issue, violated his contract by innocently printing notes from the same plates for criminals who circulated them. To avert panic the plaintiff recalled the issue, substituting other inconvertible bills for both genuine and spurious notes. In action on breach of contract, plaintiff claims the exchange value of the notes substituted for the spurious notes. Defendant admits liability only for the cost of printing such notes. *Held*, (two justices dissenting) that the measure of damages is the exchange value of the currency substituted for the spurious notes plus the printing cost thereof. *Banco de Portugal v. Waterlow* [1932] A. C. 452.

Both the majority and minority opinions of the court cited and applied the rule of *Hadley v. Baxendale*,[1] a doctrine thoroughly accepted in England and America,[2] except in rare cases.[3] It was found difficult to apply the rule in the instant case, the court differing as to how to translate losses in inconvertible Portuguese notes into English money. The minority reasoned [4] that a bill has only chattel value until delivery,[5] overlooking the fact that the plaintiff's loss occurred in such a delivery. They then turned to the commodity theory of money [6] to prove that these notes were without value. When faced with the argument that, for liquidation purposes, the bank's liabilities had increased with no increase in assets, they turned to the quantity theory of money,[7] and by failing to realize its full import,[8] concluded that the bank lost only the printing cost. The majority considered all the factors affecting the currency of the bills, as is done

[13] Although no cases were found holding directly *contra* to the principal cases, it is significant to note that in United States v. Lehigh Valley R. Co., 220 U. S. 257, 31 Sup. Ct. 387 (1911), the Supreme Court affirmed other decisions holding the Lehigh Valley Coal Co. to be merely the *alter ego* of the railroad for the purpose of applying a ruling concerning the carriage by the road of its own goods, and yet the coal company continued in business under the same letters patent until 1928, all the while suing and being sued in state and federal courts without liability being placed on the railroad for its debts. Philadelphia v. Lehigh Valley Coal Co., 290 Pa. 87, 138 Atl. 94 (1927) (contract action wherein the court discusses the relations of the corporations since 1911); Rushonsky v. Lehigh Valley Coal Co., 293 Pa. 150, 141 Atl. 851 (1928) (workman's compensation case).

[1] ". . . measure of damages should be such as may fairly and reasonably be considered as arriving either naturally, *i. e.* according to the usual course of things from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." 9 Ex. 341, 354 (Eng. 1854).

[2] Central Trust Co. v. Clark, 92 Fed. 293 (C. C. A. 8th, 1899); Meyer v. Hudson Trust Co., 181 App. Div. 69, 168 N. Y. Supp. 387 (1917); Dondin v. Borden, 230 Mass. 73, 119 N. E. 184 (1918); Spiese v. Mutual Trust Co., 258 Pa. 422, 102 Atl. 121 (1917).

[3] See for instance Bauer, *Consequential Damages in Contract* (1932) 80 U. OF PA. L. REV. 6.

[4] At 484, and at 498.

[5] NEGOTIABLE INSTRUMENTS LAW § 16.

[6] *I. e.* The sole source of the value of inconvertible money is the prospect of redemption. SCOTT, MONEY AND BANKING (1903) 58-60, 101-104; LAUGHLIN, PRINCIPLES OF MONEY (1920) 530.

[7] *I. e.*, the quality of money is irrelevant. The sole question of importance is its quantity—the number of money units—provided velocity of circulation and volume of trade are constant. FISHER, PURCHASING POWER OF MONEY (1913) 30-34.

[8] *Id.* 11-15. Professor Fisher means by the value of money, its purchasing power, which is expressed in the English monetary system by the exchange value of the currency.

in the social value theory of money,[9] and by likening the bank's obligation to that of a trader,[10] concluded that the bank had suffered a loss of exchange value. Although the social value theory is new, this decision establishes no novel means of computing damages. In America and in England, the measure of damages in the goods cases [11] has been the market price, and the exchange value is the market price of money. In earlier cases involving notes,[12] both English and American courts have selected the value as of the time and place of payment as their standard. In a forgery case resembling the instant case in many respects,[13] the Exchequer recognized this as the value to be paid to innocent holders, without litigation. The measure adopted is certainly most just and equitable under the circumstances. It recognizes that in parting with the substitution notes, the bank has parted with a *res* which would purchase the same amount of commodities as would the exchange value in any currency, and since value is exchange value [14] it should be the measure of the bank's loss.

EQUITY—MORTGAGES—FINANCIAL DEPRESSION AS GROUNDS FOR ENJOINING FORECLOSURE—Plaintiffs, mortgagors of land by a deed of trust, sought to enjoin the trustee from exercising his power of sale on the grounds that the financial depression would make it impossible to sell the land at its fair market value. *Held,* that the grounds for enjoining sale were insufficient. *Bolich et ux v. Prudential Ins. Co. of America et al.,* 164 S. E. 335 (N. C. 1932).

When relief has been sought in equity by financially embarrassed mortgagors squarely on the grounds of an economic depression the courts have been united in refusing to recognize such a condition as one worthy of equitable notice.[1] The chancellors have based their decisions at times on the reasoning that if equity were to interfere in such cases the courts would become instruments of speculation on future values of property.[2] As there is little equity in such logic some courts have gone further and given as their basis for refusal the right of the mortgagee who has acted in good faith to protection.[3] Undoubtedly the basic reason is that equity is too thoroughly bound by precedent to interfere with powers of sale conferred by mortgagors [4] and pledgors [5] because of

[9] The value of money is psychological rather than physical, depending on many factors such as belief, custom, laws, patriotism, and a network of legal relationships expressed in terms of the money in question. ANDERSON, THE VALUE OF MONEY (1926) 136-141.

[10] At 476, and at 488.

[11] O'Hanlon v. Great Western Rwy., 6 B. & S. 484 (Eng. 1865).

[12] Masson v. Biddle, 6 J. J. Marshall 30 (Ky. 1831); Lockridge v. Stone, 7 Ky. Op. 35 (1873); Miller v. Race, 1 Burr. 452 (Eng. 1758); Guardians of Lichfield Union v. Green, 1 H. & N. 84 (Eng. 1857).

[13] FRANCIS, HISTORY OF THE BANK OF ENGLAND (1862) 259-261, discusses a case where unauthorized Exchequer notes were put into circulation in much the same fashion, and the Exchequer paid in full all who had received them without notice, or suspicious circumstances. The case is not reported.

[14] National Bank of Commerce v. New Bedford, 155 Mass. 313 (1892).

[1] Muller v. Bayly, 62 Va. 521 (1871); Anderson v. White, 2 App. 408 (D. C. 1894); Commonwealth Bank & Trust Co. v. MacDonnell, 49 S. W. (2d) 525 (Tex. 1932).

[2] Lipscomb v. New York Life Ins. Co., 138 Mo. 17, 39 S. W. 455 (1897); see Miller v. Parker, 73 N. C. 58, 60 (1875).

[3] See Miller v. Parker, *supra* note 2, at 60. In Anderson v. White, *supra* note 1, at 417, the court also considered that to give relief would impair contract obligations and extend the guardianship of equity to those who are laboring under no disability to contract for themselves.

[4] 1 HIGH, INJUNCTIONS (4th ed. 1905) § 456; see Warner v. Jacob, 20 Ch. D. 220 (1881); 2 COOTE, MORTGAGES (9th ed. 1928) 931.

[5] Park v. Musgrave *et al.,* 2 Thomp. & C. 571 (N. Y. 1874) (pledge of stock). In Albers Commission Co. v. Spencer, 205 Mo. 105, 120, 103 S. W. 523, 527 (1907), the court strongly showed its indifference to speculators. "It was only a battle between the bears and the bulls in which the latter seem to have been the victors. There is nothing in that kind of contest that especially appeals to the jurisdiction of a court of equity."

hardships to them.[6] In some few cases, however, equity has indirectly taken notice of a financial depression, and has given relief to mortgagors by setting aside foreclosure sales during periods of stagnant markets, seizing as grounds for doing so the slightest, almost fictional, irregularities in the procedure.[7] The Supreme Court of the United States has taken into account the necessity of recognizing low values by holding that a bankruptcy court could restrain foreclosure proceedings instituted after the bankruptcy of the mortgagor.[8] As has been suggested[9] this gives the trustee an opportunity to survey the real estate market and to obtain the highest possible sales price. It has even been recognized that in certain situations equity might interfere directly on the grounds of scarcity of money.[10] It is to be hoped that recent decisions in analogous cases on Building and Loan Associations[11] coupled with the creation of the Reconstruction Finance Corporation,[12] may induce the courts of equity to recognize the comparative insignificance of precedent in the face of a great economic upheaval.

INSURANCE—CO-OPERATION CLAUSE—CONCLUSIVENESS OF FALSE REPRESENTATION AS BREACH—Insured, while otherwise co-operating[1] with the insurer in defending an action by an injured third party, falsely represented that he had

[6] Carpenter v. Landcraft, 3 W. Va. 540 (1869) (where there was scarcity of money, poor season of the year, and bad weather); McCulla v. Beadleston, 17 R. I. 20, 20 Atl. 11 (1890) (where the mortgaged property considerably exceeded in value the amount of the debt); Graf *et al.* v. Hope Bldg. Corp., 254 N. Y. 1, 171 N. E. 884 (1930) (where there was an acceleration clause and an accidental delay in payment of interest). *Contra:* Console v. Torchinsky, 97 Conn. 353, 116 Atl. 613 (1922).

[7] Vail v. Jacobs, 62 Mo. 130 (1876); Rohner v. Strickland, 116 Va. 755, 82 S. E. 711 (1914). In Wagener v. Yetter, 280 Pa. 229, 232, 124 Atl. 487, 488 (1924), the court said: "We are not unmindful of the rule that mere inadequacy of price without more is not enough for setting aside a sheriff's sale, yet where as here the inadequacy is so great as to shock the conscience of the chancellor, this court will seize upon even slight circumstances in order to give relief."

[8] Isaacs, Trustee v. Hobbs, 282 U. S. 734, 51 Sup. Ct. 270 (1931). There was no mention in this case of the depression as grounds for the decision, but there is no doubt that low market values motivated the court in arriving at its result. See Note (1931) 80 U. OF PA. L. REV. 412, for a full discussion of this case. *Cf. In re* Grand Leader, Inc., 50 F. (2d) 264 (C. C. A. 2d, 1931).

[9] See (1931) 80 U. OF PA. L. REV. 123, 124.

[10] In the principal case, at page 336, the court hinted at this but did not commit itself: "Perhaps no court is wise enough to declare with absolute finality that no economic or financial stringency or distress would warrant the intervention of equitable principles in restraining the power of sale in instruments securing debts, but certainly the mere allegations of general depression before the property has been sold and an unconscionable purchase price established has not heretofore been deemed adequate to invoke equitable power." See also Floore *et al.* v. Morgan *et al.*, 175 S. W. 737, 739 (Tex. 1915).

In Graf *et al.* v. Hope Bldg. Corp., *supra* note 6, at 8, 171 N. E. at 888, Cardozo in a vigorous dissenting opinion flayed the sterility of the equity courts: "There is no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal *ad misericordiam* however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course . . . Equity follows the law, but not slavishly nor always." See (1930) 79 U. OF PA. L. REV. 229.

[11] Brown v. Victor Building Association, 302 Pa. 254, 153 Atl. 349 (1931); Stone v. New Schiller Building & Loan Association *et al.*, 302 Pa. 544, 153 Atl. 758 (1931).

[12] It may be argued that the R. F. C. eliminates the necessity of equity aiding mortgagors during a depression. But it is submitted that as the measure is merely momentary, slow in its conception, and cumbersome in its execution, it is entirely inadequate as a speedy remedy to owners of small properties. *Cf.* (1932) 41 YALE L. J. 1252; (1931) 11 CONG. DIGEST 55.

[1] The insured denied responsibility for the accident, aided in securing witnesses, testified for the company, employed counsel to assist in the defense, and did everything the company requested to assist in defeating the claim.

not been in the car when the accident had occurred. The trial court found (a jury having been waived) that the insured had co-operated and gave judgment for plaintiff. *Held* (one judge dissenting), that the false representation by the insured conclusively breached the co-operation clause and judgment be reversed. *United States Fid. & Guar. Co. v. Wyer,* C. C. A. 10th, U. S. Daily, Aug. 19, 1932, at 1150.

The usual provision in liability policies requiring the insured to co-operate with the insurer in defending an action by an injured third party is commonly treated as a condition precedent to the right of the third party to recover on the policy.[2] As to what constitutes "co-operation" within the meaning of the clause, the weight of authority holds that it must be a frank and truthful "disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense." [3] Whether or not the condition has been breached in a given case is a question of fact,[4] though courts are not hesitant in ruling on the point as a matter of law where the character of the evidence is such as to leave but a single inference.[5] It was uncontradicted, in the instant case, that the insured had complied with every request of the insurer to assist in the defense.[6] And the trial court, having weighed it with the untrue statement, found that the insured had co-operated.[7] The overruling of the fact-finding body is questionable on that ground alone.[8] But further, in so doing, it has apparently established a

[2] Clements v. Preferred Acci. Ins. Co. of N. Y., 41 F. (2d) 470 (1930); Bachhuber v. Boosalis, 200 Wis. 574, 229 N. W. 117 (1930); see Guerin v. Indemnity Ins. Co. of N. A., 107 Conn. 649, 142 Atl. 268 (1928). *Contra:* Metropolitan Cas. Co. v. Albritton, 214 Ky. 16, 282 S. W. 187 (1926). Any defense which is good against the insured is good against the third party: Gerka v. Fidelity & Cas. Co., 251 N. Y. 51, 167 N. E. 169 (1929); Weatherwax v. Royal Indem. Co., 250 N. Y. 281, 165 N. E. 293 (1929). *Contra:* Edwards v. Fidelity & Cas. Co., 11 La. App. 176, 123 So. 162 (1929).

[3] Coleman v. New Amsterdam Cas. Co., 247 N. Y. 271 at 276, 160 N. E. 367 at 369 (1928). To same effect, see Conroy v. Commercial Cas. Ins. Co., 292 Pa. 219, 140 Atl. 905 (1928); Guerin v. Indemnity Ins. Co. of N. A., *supra* note 2.

[4] Metropolitan Cas. Ins. Co. v. Blue, 219 Ala. 37, 121 So. 25 (1928); Finkle v. Western Auto. Ins. Co., 224 Mo. App. 285, 26 S. W. 843 (1930); Seltzer v. Indemnity Ins. Co., 252 N. Y. 330, 169 N. E. 403 (1929).

[5] Where, for instance, the insured refuses to give any assistance at all, Coleman v. New Amsterdam Cas. Co., *supra* note 3; Rohlf v. Great American Mut. Co., 27 Ohio App. 208, 161 N. E. 232 (1927); or, where he colludes with the injured party, Buckner v. Buckner, 241 N. W. 342 (Wis. 1932); or, where he wilfully misinforms the insurer, Bassi v. Bassi, 165 Minn. 100, 205 N. W. 947 (1925).

[6] The insurer's adjuster testified that the insured co-operated "one hundred per cent." U. S. Daily, Aug. 19, column 4, at 1150. See also *supra* note 1.

[7] The court relied chiefly on Coleman v. New Amsterdam, *supra* note 3, and Buckner v. Buckner, *supra* note 5. But the conclusive rulings of these courts were eminently justified in that in the former the insured refused point blank to aid in the defense and in the latter case the evidence was decisive that collusion was present. The same court which decided the Coleman case held in Seltzer v. Indemnity Ins. Co., *supra* note 4, that the question of co-operation should have been submitted to the jury where the insured at the trial declined to testify in accordance with his previous statement exculpating him from liability. The trial court was reversed because it found the co-operation clause breached as a matter of law. There are other courts which have held that inconsistent statements do not effect a conclusive breach: Francis v. London Guar. & Acci. Co., 100 Vt. 425, 138 Atl. 780 (1927); Taxicab Motor Co. v. Pacific Coast Cas. Co., 73 Wash. 631, 132 Pac. 393 (1913).

[8] The court also rejected the doctrine relied on by the plaintiff that the insurer must prove the misstatement prejudicial to its case. This rule has the support of an apparent majority of jurisdictions. Finkle v. Western Auto. Ins. Co., *supra* note 4; George v. Employers' Liabil. Assur. Corp., 219 Ala. 307, 122 So. 175 (1929); Hynding v. Home Acci. Ins. Co., 9 P. (2d) 999 (Cal. 1932); Sears v. Illinois Indem. Co., 9 P. (2d) 245 (Cal. 1932); Conroy v. Commercial Cas. Ins. Co., *supra* note 3; 13-14 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW (9th ed. 1932) 378, 379. The court accepted the principle that the condition of the policy is breached even though no adverse effects follow the misstatement. This contention has its support in: Coleman v. New Amsterdam Cas. Co., *supra* note 3; Buckner v. Buckner, *supra* note 5; American Auto. Ins. Co. v. Fidelity & Cas. Co. of N. Y., 159 Md. 631, 152 Atl. 523 (1930).

situation wherein the insurer is possessed of an adequate defense if the statement of the insured be found true, in which case the insured would not be at fault, and is relieved of liability if the statement be found untrue, since it could successfully plead a breach of the co-operation clause.[9]

INTERSTATE COMMERCE—JURISDICTION OF THE FEDERAL TRADE COMMISSION OVER HOLDING COMPANY CONTROLLING SUBSIDIARIES ENGAGED IN INTERSTATE COMMERCE—The officers of the Electric Bond & Share Company, a public utility holding company, filed objections to questions asked asked them by the Federal Trade Commission concerning services rendered its subsidiaries. The court overruled these objections on the assumption that the company was engaged in interstate commerce.[1] The instant case was an adjudication based on a reference[2] in which the company contested the validity of this assumption. Among the exhibits was an agreement between the holding company and a supply company in which the former agreed to *"cause to be purchased"* from the supply company such apparatus as its subsidiaries required.[3] *Held,* that the holding company was engaged in interstate commerce, and that the officers must answer all questions relating to the cost of rendering the purchasing and other services rendered its subsidiaries. *Federal Trade Commission v. Smith,* et al., S. D. N. Y., U. S. Daily, Sept. 13, 1932, at 1302.

Congress, in furtherance of its regulatory[4] and visitorial[5] power over corporations engaged in interstate commerce, established the Federal Trade Commission,[6] with authority to "investigate the business, conduct, practises, . . . of any corporation engaged in [interstate] commerce",[7] and to compel disclosures thereof through the instrumentality of the court.[8] This power conferred on the Commission extends[9] over not only the contracts of purchase,[10] sale[11] or exchange, whose direct effect is to require interstate movement of materials, but also any act or instrumentality which directly affects[12] such commerce. The pur-

[9] See dissenting opinion, U. S. Daily, Aug. 20, columns 6 and 7, at 1158.

[1] Federal Trade Commission v. Smith *et al.,* 34 F. (2d) 323 (S. D. N. Y. 1929), (1929) 28 MICH. L. REV. 195.

[2] As to references in equity, see Kimberley v. Arms, 129 U. S. 512, 523, 9 Sup. Ct. 355, 359 (1888).

[3] The agreement stated, in addition to the quotation given, that "The Bond and Share Company agrees to promptly notify the General Company in case they acquire ownership or a controlling or operating interest in any company not enumerated in attached schedule. It is also agreed that if at any time by reason of change in interest, ownership or control, the Bond and Share Company shall be unable to control the purchase of equipment by any of the Subsidiary Companies, due notice shall be given the General Electric Company, and this agreement shall no longer be applicable to said subsidiary company."

[4] U. S. Const., Art. 1, § 8, cl. 3.

[5] Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 215, 32 Sup. Ct. 436, 441 (1912); Hale v. Henkel, 201 U. S. 43, 75, 26 Sup. Ct. 370, 379 (1926).

[6] For discussion of the legislative history of the Federal Trade Commission Act, to determine what Congress intended to do by establishing this administrative body, see Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COL. L. REV. 708, 720-733.

[7] 38 STAT. 721 (1914), 15 U. S. C. A. § 46a (1927).

[8] 38 STAT. 722 (1914), 15 U. S. C. A. § 49 (1927); Hurst v. Federal Trade Comm., 268 Fed. 874 (E. D. Va. 1920); Smith v. Interstate Commerce Commission, 245 U. S. 33, 38 Sup. Ct. 30 (1917).

[9] 38 STAT. 719 (1914), 15 U. S. C. A. § 44 (1927).

[10] Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. 106 (1921); Lemke v. Farmers Grain Company, 258 U. S. 50, 42 Sup. Ct. 244 (1921).

[11] County of Mobile v. Kimball, 102 U. S. 691, 702 (1880); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 5 Sup. Ct. 826, 828 (1884).

[12] Chamber of Commerce *et al.* v. Federal Trade Comm., 13 F. (2d) 673 (C. C. A. 8th, 1926); United States v. Basic Products Co., 260 Fed. 472, 477 (W. D. Pa. 1919).

chases of materials by the subsidiaries, in the instant case, causing such movements of supplies, were clearly acts of interstate commerce.[13] The holding company, in the pursuance of its agreement with the supply company,[14] controlled these purchases and the interstate flow of goods to and from its subsidiaries resulting therefrom, by means of minority stock interests and interlocking directorates; hence it sufficiently affected [15] interstate commerce to be considered "engaged in interstate commerce", within the meaning of the Federal Trade Commission Statute.[16] Yet the holding that the company must answer questions relating to the cost of "any services" rendered its subsidiaries seems broad. For, although most of the subsidiaries which the holding company controlled were engaged, as to part of their business, in interstate commerce,[17] it is conceivable that many of their activities were purely intrastate in their extent. Unless it were clearly shown that the particular service to the subsidiaries, based on this control of the holding company, which the Commission wished to investigate, directly affected their interstate activities, as did the purchasing service, the Commission could not acquire inquisitorial jurisdiction.[18] If the services affecting their interstate and intrastate commerce could not be separated, or if, perhaps, the general fee charged the subsidiaries was for services affecting both classes of commerce, then the Commission could investigate the cost to the holding company of these services.[19] Nevertheless, apart from this distinction, the decision is eminently desirable, because it gives the Commission power to fill the need of accurate and exhaustive information concerning public utility holding companies.[20]

TAXATION—DECEDENTS' ESTATES—CONSTITUTIONAL LAW—VALIDITY OF STATUTE REPEALING EXEMPTIONS IN ITS RETROACTIVE APPLICATION TO UNDISTRIBUTED PERSONALTY—From a ruling of the probate court, declaring a bequest to Harvard College exempt from taxation [1] under the Connecticut 1929 inheritance tax law, then in force, the Tax Commissioner appealed. The executor paid over most of the bequest to Harvard, reserving only amount to cover possible taxation. Thereafter a 1931 Succession Tax became effective, the terms of the clause therein repealing exemptions [2] to apply "to all suits . . . pending

[13] See cases *supra* note 10.

[14] *Supra* note 3. In the instant case, the contract was conclusive evidence of an actual control exercised by the holding company over its subsidiaries.

[15] See cases *supra* note 12.

[16] In Chamber of Commerce *et al.* v. Federal Trade Comm., *supra* note 12, at 684, the court held that the Chamber of Commerce, whose rules governed its members in the trading of grain, resulting in the interstate movement thereof, "is an instrumentality in the current of interstate commerce which directly affects such commerce and is within the regulatory power of Congress", and of the Federal Trade Commission.

[17] Interstate commerce includes the interstate transmission of electricity, Public Utilities Commission of R. I. *et al.* v. Attleboro Steam & Electric Co., 273 U. S. 83, 47 Sup. Ct. 294 (1926), and of gas, Missouri v. Kansas Gas Co., 265 U. S. 299, 44 Sup. Ct. 544 (1923).

[18] Federal Trade Comm. v. Claire Furnace Co. *et al.*, 285 Fed. 936 (App. D. C. 1923), *rev'd*, 274 U. S. 160, 47 Sup. Ct. 553 (1927) on other grounds; United States v. Basic Products Co., *supra* note 12, at 479.

[19] Interstate Commerce Comm. v. Goodrich Transit Co., *supra* note 5; United States v. New York Central R. R., 272 U. S. 457, 464, 47 Sup. Ct. 130, 133 (1926).

[20] Report of Commission on Revision of the Public Service Commission Law, Legislative Document (1930) No. 75, N. Y., at 27.

[1] As interpreted by the court in the present case, the 1929 Succession Tax, CONN. GEN. STAT. (1930) § 1367, allowed tax exemption of bequests to educational institutions, domestic or foreign, which had a strictly public function as non-profit-bearing organizations.

[2] CONN. GEN. STAT. SUPP. (1931) § 243a. This statute repealed the exemption as to foreign public corporations, resident in states not having reciprocal taxation exceptions in favor of similar Connecticut corporations. Reciprocal statutes of this kind are now common. See Brady, *Death Taxes, Developments in Reciprocity* (1929) 15 A. B. A. J. 465.

for the collection of any taxes due to the State." [3] *Held,* that though bequest was exempt under the 1929 statute, the 1931 statute applied, and the exemption being removed, the tax should be imposed, measured by the amount of the entire bequest. *Blodgett, Tax Comm'r v. Bridgeport City Trust Co., Executor,* 161 Atl. 83 (Conn. 1932).

It is generally held that until final distribution of a decedent's estate, the legislature may impose a new death tax or remove a previous exemption upon personalty at any time.[4] However arbitrary [5] and unfair [6] this practice may appear, it has almost invariably been held not violative of the Federal or State Constitutions. Legal investiture [7] of personalty in the beneficiary and the termination of control and power to impose a transfer tax by the state occur only upon legal distribution in accordance with such statutory provisions as the state may impose.[8] In the present case, the fact that Harvard had been paid most of the bequest before the operation of the retroactive statute is immaterial, since the state had a right to have the bequest held by the executor in its entirety or paid over at his peril until such time as the merits of the appeal taken by its agent should be adjudicated.[9] And, although final distribution would probably have

[3] A typical retrospective or retroactive cause. Normally, death tax legislation is interpreted as prospective, *i. e.*, having reference to decedents' estates created subsequent to the effective date of the statute. The retroactivity of statute must be specifically stipulated. Gilbertson v. Ballard, 125 Iowa 420, 101 N. W. 108 (1904); *In re* Line's Estate, 155 Pa. 378, 26 Atl. 728 (1893); Commonwealth v. Herbert, 127 Va. 291, 103 S. E. 645 (1920).

[4] The proposition is based on the premise that no one has a "natural" right to receive a dead man's property. He has merely a statutory privilege gratuitously bestowed. The state may therefore make the transfer of devised property subject to any condition. Statutes may provide that the legal title to personalty shall not vest so as to give the beneficiary a property right within the meaning of constitutional provisions forbidding unequal taxation of vested interests, until final distribution. Cahen v. Brewster, 203 U. S. 543, 27 Sup. Ct. 174 (1906); Ferry v. Campbell, 110 Iowa 290, 299, 81 N. W. 604 (1900). So also, the legislature may change time of valuation from the time of death to the time of taking possession and thereby subject the beneficiary to taxation on an increased value. Attorney General v. Stone, 209 Mass. 186, 95 N. E. 395 (1911). This appears the logical view, and one which the majority of courts follow. There is, however, considerable holding against the constitutionality of retroactive taxation. For full discussion of the cases, see Note (1923) 26 A. L. R. 1461.

[5] Arbitrary in that the legislature may choose any moment before final distribution to levy its excise.

[6] It is submitted that since the law allows the beneficiary to mortgage, sell and devise his "equitable" interest, before coming into possession, he is encouraged to make contracts into which he would not have entered had he been able to foresee future retrospective taxation. The greatest unfairness, however, is to the deceased, since it is often probable that the terms of his will would have been otherwise had he been able to foresee a legislative change in death taxation. On this ground, retroactive operation of death taxes on irrevocable transfers in trust has been declared invalid. Coolidge v. Nichols, 4 F. (2d) 112, 117 (D. Mass. 1925). "The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures." Untermeyer v. Anderson, 276 U. S. 440 at 446, 48 Sup. Ct. 353 at 354 (1927). See also Milliken v. United States, 283 U. S. 15, 51 Sup. Ct. 324 (1931); *cf.* Klein v. United States, 283 U. S. 231, 51 Sup. Ct. 398 (1931). It is submitted that such reasoning may very well be applied to *all* retroactive inheritance taxation.

[7] Vested rights cannot be taxed retroactively. Matter of McKelwar, 221 N. Y. 15, 16 N. E. 348 (1917); Lacy v. State Treasurer, 152 Iowa 477, 132 N. W. 843 (1911). Inheritance taxation being excise in character, a tax upon the *transfer* of property, when the transfer is complete, *i. e.*, when beneficiary comes into legal possession, the property is no longer subject to tax. See Note (1929) 15 VA. L. REV. 791.

[8] Cahen v. Brewster, *supra* note 4; Prevost v. Greneau, 19 How. 1 (U. S. 1857). The Connecticut Distribution Statute provided that "final" distribution should not take place until the administration account had been adjudicated and settled. CONN. GEN. STAT. (1930), §§ 1360-1401; CONN. GEN. STAT. SUPP. (1931), § 243a.

[9] Distribution may be suspended or withheld pending the determination of disputes affecting the distribution. *In re* Kittson, 45 Minn. 197, 48 N. W. 419 (1891). The administration account should be finally settled. *In re* Shield, 122 Cal. 528, 55 Pac. 328 (1898); *In re* Harding, 24 Pa. 189 (1855). Voluntary payments to distributees without order of court are made at peril of executor. McPaxton v. Dickson, 15 Ark. 41 (1854).

taken place before the operation of the retroactive statute had it not been for the appeal of the Tax Commissioner, taken, as it developed, wrongly, the imposition of a tax under the new statute was within the province of the legislature.[10] Yet the decision in the instant case is regrettable, since the court might very easily have declared the bequest not affected by the retroactive clause of the 1931 statute, no tax in fact being *due* under previous death tax laws. But despite objections to taxation in the present situation, the probability is that it will remain established law, unless a constitutional amendment [11] be passed forbddng retroactive taxation legislation.[12]

TORTS—CHARITIES—MASTER AND SERVANT—LIABILITY OF CHARITABLE INSTITUTIONS FOR NEGLIGENCE OF SERVANT—Plaintiff was injured by negligence of defendant's ambulance driver. *Held,* that the fact that defendant is a charitable organization does not relieve it of liability for negligent injury to persons not beneficiaries of the charity. *Daniels v. Rahway Hospital,* 160 Atl. 644 (N. J. 1932).

Defendant companies maintained a "sick benefit fund" by assessing employees' wages, making up the deficits from their own funds. Plaintiffs sued for the death of their son caused by the negligence of the doctor selected by defendants. *Held,* that since defendants were administering a charity, they were not liable to a beneficiary for the doctor's negligence, having exercised due care in engaging him. *Thomas et ux. v. Postal Telegraph-Cable Co., et al.,* 48 S. W. (2d) 422 (Tex. 1932).

These two decisions indicate the crystallization of two rules of law adopted by most courts in their application of the doctrine of *respondeat superior* to charitable institutions. The line between the two rules is sharply defined, despite the fact that the reasons advanced for the distinction are often inconsistent. The *Daniels* case, in holding the charity liable for negligent injury to a stranger, follows the growing majority rule which holds such institutions responsible to strangers,[1] invitees [2] and servants.[3] The *Thomas* case, in denying recovery to a beneficiary, adheres to the rule almost universally applied in such cases,[4] and further illustrates the tendency of some courts to include in their definition of charities enterprises which are merely incidental to the operation of a business organization.[5] Some courts have gone so far as to allow complete exemption

[10] Ferry v. Campbell, *supra* note 4; Montgomery v. Gilbertson, 134 Iowa 291, 111 N. W. 964 (1907); Mathews' Appeal, 72 Conn. 555, 559, 45 Atl. 170, 171 (1900). *Contra:* Succession of Stauffer, 119 La. 66, 43 So. 928 (1907); *cf.* Hostetter v. State, 26 Ohio C. C. 702 (1905).

[11] See GLEASON OTIS, INHERITANCE TAXATION (4th ed. 1925) 307.

[12] The present public policy has operated to admit considerable latitude in inheritance taxation by lax constitutional interpretation.

[1] Basabo v. Salvation Army, 35 R. I. 22, 85 Atl. 120 (1912); see Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406 (1911).

[2] Marble v. Nicholas Senn Hospital Association, 102 Neb. 343, 167 N. W. 208 (1918); Hospital of St. Vincent of Paul v. Thompson, 116 Va. 101, 81 S. E. 13 (1914).

[3] McInerny v. St. Luke's Hospital, 122 Minn. 10, 141 N. W. 837 (1913); Hewett v. Women's Hospital Association, 73 N. H. 556, 64 Atl. 190 (1906).

[4] Union Pacific Ry. Co. v. Artist, 60 Fed. 365 (C. C. A. 8th, 1894); Weston's Administratrix v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S. E. 785 (1921).

[5] In Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888), the court held that a fire insurance patrol, maintained jointly by fire insurance companies to hurry to fires and save whatever property it could, is a charity, and therefore, exempt from liability for negligence of its servants. Courts uniformly hold that if there is a direct pecuniary profit to the corporation, the enterprise is not a charity. Texas & Pacific Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173 (1899); Sawdey v. Spokane Falls & Northern R. Co., 30 Wash. 349, 70 Pac. 972 (1902). In both the Boyd case and the Thomas case, there is a distinct individual benefit to the corporations, but the courts refused to give it any legal weight. It is interesting to note that in the cases in which a hospital is maintained for employees in or-

to charities regardless of the status of the person injured.[6] The exemption in all cases is based upon one or more of three theories; (1) the funds of the charity are trust funds,[7] and to divert them for the payment of damages would work a misapplication of the trust, and defeat the purpose of the donors; (2) one who accepts the benefits of the charity waives the right to recover;[8] (3) the doctrine of *respondeat superior* should not apply to charities.[9] The fundamental reason for the exemption of charities from liability for negligence is undoubtedly public expediency. Courts have hesitated to deny recovery on that ground alone, however, and in attempting to support their conclusions by one or more of these three theories, have been led into inconsistencies. It is a patent contradiction, for example, to approve the trust fund theory with regard to a beneficiary, as in the *Daniels* case, while allowing recovery to a stranger.[10] It must be borne in mind that this rule of exemption arose at a time when charities were supported by a few individuals, and hence their resources were necessarily limited. Today, however, services in the nature of charity are being dispensed by large, well endowed corporations, and therefore the reason for the rule having disappeared, the rule itself should have no application. Some courts have so held.[11] A rule subjecting charitable enterprises in all cases to the usual rules of liability for negligence would not only remove the attendant inconsistencies but would also give effect to a more advanced public opinion.[12]

TORTS—WARRANTY—MANUFACTURER'S LIABILITY TO REMOTE VENDEE FOR MISREPRESENTATION—Buyer sued manufacturer for injuries caused by the breaking of a windshield represented to have been shatter-proof. *Held,* that manufacturer is liable on his representation that car was equipped with such windshield, regardless of lack of privity of contract. *Baxter v. Ford Motor Co. et al.,* 12 P. (2d) 409 (Wash. 1932).

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der to relieve the employer of liability for injuries to servants, the courts have ruled that it is not a charity. Miller v. Chicago B. & Q. R. Co., 65 Fed. 305 (C. C. D. Colo. 1894); Haggerty v. St. Louis K. & N. W. Co., 100 Mo. App. 424, 74 S. W. 456 (1903). In these cases there is no direct pecuniary profit, but still the courts have considered this as equivalent to a profit. The distinction between these cases, the Boyd and Thomas cases, and those cases where there is a direct pecuniary profit seems to rest on a difference in degree alone.

[6] Foley v. Wesson Memorial Hospital Association, 246 Mass. 363, 141 N. E. 113 (1923); Fire Insurance Patrol v. Boyd, *supra* note 5. For a detailed criticism of the latter case see Gest, *Public Charities and the Rule of Respondeat Superior* (1889) 37 AM. L. REG. (N. S. 28) 669.

[7] Emery v. Jewish Hospital Association, 193 Ky. 400, 236 S. W. 577 (1921); Perry v. House of Refuge, 63 Md. 20 (1884). The extension of this theory to its logical conclusion would free charities from all tort liability.

[8] Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294 (C. C. A. 1st, 1901). The great objection to this theory is that it is not founded in fact. "A patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that the courts after years of travail have at last produced." Fraser, J., dissenting, in Lindler v. Columbia Hospital, 98 S. C. 25 at 36, 81 S. E. 512 at 515 (1914).

[9] See Fire Insurance Patrol v. Boyd, *supra* note 5; Zollman, *Damage Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395, 407. The New York theory advanced in Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92 (1914) holds that physicians and nurses, acting in their professional capacities, are not servants of the charity, but of the beneficiary. This theory does violence to the facts in saying that a charity patient coming to such an institution for aid, impliedly selects such attendants as his own.

[10] Daniels case at 645.

[11] Tucker v. Mobile Infirmary Association, 191 Ala. 572, 68 So. 4 (1915); Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N. W. 699 (1920).

[12] Feezer, *Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191.

In giving effect to a representation not based on any privity of contract, the court appears to have made an innovation in the law of warranty.[1] Such a decision coincides with the theory advocated by Professor Williston who urges the similarity of warranty as a basis for establishing a uniform rule of liability without fault for misrepresentation.[2] From the viewpoint of tort law, however, the instant case does not mark so great a departure from settled law. Liability for misrepresentation, though usually based on "fraud and deceit", has, as Professor Bohlen has pointed out,[3] been extended to cases in which *scienter* is completely lacking.[4] Upon the analogy of turning over lands and chattels, the latter has suggested as a test, that there should be liability for any negligent misrepresentation made in the course of one's business.[5] The instant case readily falls within this category provided that the misrepresentation was, in fact, negligent. If, however, (and this fact was not definitely determined), the misrepresentation was innocent, Professor Bohlen's classification might well be extended to cover the situation, by analogy to the absolute liability imposed upon persons engaged in ultra-hazardous activities.[6] Such extension is justified where, as here, the article, while neither inherently dangerous nor defectively made,[7] may involve a danger of which the purchaser is not aware, due to his just reliance on the manufacturer. Apart from any such classification, however, the court, in recognizing the demands which the exigencies of changing economic conditions make upon the law,[8] reached a decision which is at once socially just and in harmony with the best legal thought.[9]

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[1] The principal case, at 412, "recognizes the right of a purchaser to a remedy against the manufacturer because of damages suffered by reason of a failure of goods to comply with the manufacturer's representations as to the existence of qualities which they did not in fact possess, when the absence of such qualities was not readily discoverable, even though there was no privity of contract between the purchaser and the manufacturer." (Note that the court makes no mention of negligence.)

[2] Williston, *Liability for Honest Misrepresentation* (1910) 24 HARV. L. REV. 415, 435.

[3] Bohlen, *Misrepresentation as Deceit, Negligence or Warranty* (1928) 42 HARV. L. REV. 733, 738.

[4] For cases treating negligent misrepresentation as a type of deceit in order to impose liability, see: Lehigh Zinc and I. Co. v. Bramford, 150 U. S. 665, 14 Sup. Ct. 219 (1883); Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168 (1888); Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923 (1897); see also Mulroy v. Wright, 240 N. W. 116 (Minn. 1932) which follows Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922), in explicitly placing the basis of liability on negligent misrepresentation; (1930) 79 U. OF PA. L. REV. 364.

[5] See Bohlen, *supra* note 3, at 741.

[6] The buyer's unfamiliarity with the complicated mechanics of manufacture leaves him dependent upon the honesty of the manufacturer's representations. An injury due to reliance on such misstatements might well be compared to an injury caused by the carrying on of a dangerous occupation, in which courts impose liability irrespective of fault. Exner v. Sherman Power Const. Co., 54 F. (2d) 510 (C. C. A. 2d, 1931); discussed in (1932) 80 U. OF PA. L. REV. 924. It is submitted, therefore, that this type of protection should not be withheld from the consumer. See TORTS RESTATEMENT, Tentative Draft No. 5 (Am. L. Inst. 1930) Explanatory Notes at 8, for reasons underlying holdings of absolute liability. The modern manufacturer no longer requires the protection his predecessors enjoyed. The burden should fall upon him who can best distribute its weight. See Feezer, *Ability to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases* (1929) 78 U. OF PA. L. REV. 805, 811.

[7] *Cf.* MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916), in which court expressly expanded the liability of the manufacturer to remote vendees to include articles dangerous only if defectively made. See TORTS RESTATEMENT, Tentative Draft No. 5, § 265. Such an expansion does not cover the facts in the instant case because the absence of a shatter-proof windshield may not reasonably be said to be a defect in an automobile. Thousands are equipped with ordinary glass.

[8] Principal case at 412.

[9] See Bohlen, *Should Negligent Misrepresentation Be Treated as Negligence or Fraud?* (1932) 18 VA. L. REV. 703; Williston, *supra* note 2.